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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1927.

No. [redacted] 91

SAMUEL PRELA, trading as SELWELL BLOUSE COMPANY,

Petitioner,

vs.

LOUIS HUBSHMAN, Trustee in Bankruptcy of SAMUEL PRELA, trading as SELWELL BLOUSE COMPANY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

GEORGE LION COHEN,
Solicitor for Respondent,
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Borough of Manhattan,
City of New York.

(33,249)

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Supreme Court of the United States

OCTOBER TERM, 1927.

No. 837.

SAMUEL PELLA, trading as SEWELL BLOUSE COMPANY,
Petitioner,

AGAINST

LOUIS HUESHMAN, Trustee in Bankruptcy of SAMUEL PELLA, trading as SEWELL BLOUSE COMPANY,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

The Nature of This Bankruptcy.

The bankrupt's schedules filed herein show total liabilities amounting to $23,701.31. The actual net assets are less than $4,000 (though the schedules claim $10,876.49). On January 1st, 1924, the bankrupt's assets exceeded his liabilities by more than $12,000. In the eleven months preceding the filing of the petition between $25,000 and $31,000 disappeared (fol. 383).

The bankrupt conducted a small business, with low operating expenses; his business was well run; he kept

a set of books; retained the same employees for several years, and no reason for the large discrepancy between assets and liabilities appears, except the fraudulent concealment upon which the turnover order was entered (fol. 384).

The sum of $10,223, which the trustee was able to trace to the bankrupt, was undoubtedly part of a much larger sum concealed by the bankrupt. The turnover order was based upon the assumption that the bankrupt had no merchandise in his possession on September 1st, 1924, three months before the petition was filed. *If the amount of the merchandise in his possession on September 1st, 1924, had been added to the amount for which the bankrupt was held accountable, the amount found to have been concealed by the bankrupt would have been much greater* (fols. 384-5).

The Turnover Proceedings Resulting in the Order Finding Bankrupt in Contempt.

An involuntary petition was filed on November 22nd, 1924 (fols. 3, 312). Louis Hubshman was elected trustee on January 20th, 1925, (fols. 48, 374). On July 3rd, 1925, after a thorough investigation of the bankrupt's affairs, the trustee commenced a turnover proceeding against the bankrupt (fol. 375). Hearings were held before Hon. Peter B. Olney, Jr., Referee in Bankruptcy, and testimony of witnesses taken, during the months of July, September, October, November and December, 1925, and February and June, 1926, (fols. 375, 376). At these hearings the trustee called a number of witnesses and introduced documentary evidence, including the bankrupt's books. Some of the testimony against the bankrupt was extracted from the bankrupt himself, from William Klein, his brother-in-law, who was also one of bankrupt's employees.

Though these hearings continued for almost eleven months, and the bankrupt had ample opportunity to present all evidence, he did not call any of the witnesses referred to in his affidavits (fol. 377). *Nowhere in the record is there any valid reason why these witnesses were not called at the hearings upon the turnover motion* (fol. 5).

These hearings having been concluded, Referee Olney rendered a memorandum opinion on June 30th, 1926, (fols. 1-9), deciding against the bankrupt. Thereafter, on July 8th, 1926, the Referee made an order directing the bankrupt to turn over to the trustee goods, wares and merchandise and moneys in the sum of about $10,223, found to have been concealed by the bankrupt from his trustee (fols. 10-21).

On July 21st, 1926, the bankrupt filed a petition for review of the said order of the Referee (fol. 35). Thereafter the Referee certified the question to the United States District Court (fol. 35). The trustee moved to dismiss the petition for review, and to confirm the order of the Referee (fol. 36). Judge Winslow, before whom the motion was argued, on October 27th, 1926, decided the motion in favor of the trustee and dismissed the petition for review, and affirmed the order of the Referee (fols. 27, 72). An order was accordingly thereafter made on November 9th, 1926, confirming the report of the Referee, and directing the bankrupt to turn over to the trustee, within ten days, the goods, wares and merchandise and money found to have been concealed by him (fols. 22-30).

Thereafter the bankrupt applied to the Circuit Court of Appeals for leave to appeal to the Circuit Court of Appeals (fols. 39, 40, 75, 94). This motion was argued on December 6th, 1926, before that court, before Judges Hough, Mack and Learned Hand, and after argument, the Judges unanimously decided that the application

Winslow, and the *Small Shoe Company* case, *supra*, held that the turnover order made out a *prima facie* case, and that the burden was on the bankrupt to go forward with the evidence tending to show that since the date of the turnover order, July 8th, 1926, he had disposed of the property by that order found to be in his possession or control, and that, as a result, he was unable to comply with the order (fol. 248). On this theory, the Referee declined to receive, or struck out if received, all evidence designed to show that, as a matter of fact, the bankrupt was not in possession or control on July 8th, 1926, or prior thereto, of any of the property, of which, by order of July 8th, 1926, he was found to be in possession or control (fol. 248).

No evidence was produced or offered by the bankrupt to show what had been done with this property since July 8th, 1926 (fol. 248).

The Referee accordingly found that the trustee's *prima facie* case, made out by the turnover order, was entirely unanswered by the bankrupt, and he accordingly found that the bankrupt was still in possession or control of the property, and that he had failed to comply with the turnover order, and should be punished for contempt (fol. 249).

The Referee's report reviewing the facts, and stating his theory of the law, is to be found at folios 238 to 249.

In the course of the hearings before the Referee, counsel for the bankrupt contended that, under the terms of the order of Judge Winslow, testimony showing that the turnover order was erroneous (in spite of its affirmance as above set forth), was admissible. At the bankrupt's request, the Referee granted an adjournment so as to give the bankrupt an opportunity to take such steps with respect to such order as he desired (fols. 197-8, 199-204). *The bankrupt did not*

move to resettle the order, but moved for instructions to the Referee (fols. 226-30). The motion was argued before Judge Knox on July 30th, 1927, and was denied. Judge Knox, in his opinion, said:

> "I shall not instruct the Referee as requested by petitioner. When the Referee has passed finally upon the reference before him, the matter may be brought before this Court in regular order" (fol. 230).

An order denying the motion for instructions was entered on July 31st, 1927 (fols. 232-7).

Upon the report of the Referee (fols. 238-249), and upon all of the proceedings had herein, the trustee moved to confirm the Referee's report, and to punish the bankrupt for contempt (fols. 250-8). The motion came on for argument again before Judge Winslow on August 31st, 1927 (fol. 267), and Judge Winslow decided the motion in favor of the trustee, confirming the report of the Referee in every respect (fols. 259-79), and finding the bankrupt guilty of contempt (fol. 271).

Thereafter the bankrupt applied to the Circuit Court of Appeals (2nd) for leave to appeal (fols. 304-57). The trustee appeared in opposition to this application for leave to appeal, and filed an answer to the petition (fols. 358-90). The motion for leave to appeal was granted, and an order entered on October 10th, 1927 (fols. 391-4). The Circuit Court of Appeals affirmed the Court below (p. 140).

POINT I.

There is no merit to the petitioner's contention that the Referee erred, and that Judge Winslow himself erred, and that the Circuit Court of Appeals erred in interpreting Judge Winslow's order of reference dated July 8th, 1927, and that the refusal to follow the bankrupt's request to reopen the matter *de novo* upon the contempt hearing, constituted a violation of Article V of the Constitution.

As this claim by the bankrupt is so obviously without merit, it will be disposed of first.

When the motion to punish the bankrupt for contempt came up in the United States District Court, it was argued before Judge Winslow (fols. 259-278), who was already familiar with the matter. It was Judge Winslow who originally affirmed the Referee's report and the turnover order, and signed the order directing the bankrupt to turn over the property (fols. 22-31), and it was Judge Winslow to whom an application for a reargument was made, and who had denied the application (fol. 77).

Upon the argument on the return of the motion for contempt Judge Winslow made a memorandum opinion, in which he said:

> "The question as to the ability only of the bankrupt to comply with the summary order will be referred to Referee Olney. See *Re J. H. Small Shoe Co., ex parte Mary G. Potter, Trustee, etc.*" (fol. 283).

The form of the order of reference entered thereon was prepared by the attorney for the bankrupt (fol. 170), and read in part as follows:

> "Ordered that the issues raised by the aforementioned papers and pleadings as to the ability

> of the bankrupt to comply with the turnover order dated the 9th day of November, 1926, be, and the same hereby are referred to Hon. Peter B. Olney, Jr., as Referee, for hearing, testimony and report, and that such hearings proceed with all convenient speed" (fols. 333-4).

When the matter came on to be heard before the Referee, the Referee, relying on what he considered Judge Winslow's instructions in the matter, and on the principles laid down in the *Small Shoe Co.*, case, held that the only question before him was the bankrupt's ability to comply with the turnover order (fol. 246). Accordingly, he held that the turnover order of July 8th, 1926, made out a *prima facie* case that the property therein referred to was in the possession or under the control of the bankrupt on July 8th, 1926 (fol. 249), and that the burden was on the bankrupt to go forward with evidence tending to show that since the date of the Referee's turnover order, July 8th, 1926, he had disposed of the property by that order found to be in his possession and control and, as a result, was unable to comply with the order (fol. 248). On this theory the Referee declined to receive, or struck out if received, evidence designed to show that, as a matter of fact, the bankrupt was not in possession or control on July 8th, 1926, or prior thereto, of any of the property which, by the order of July 8th, 1926, he was found to be in possession or control (fol. 248).

Bankrupt's counsel contended that the issues before the Referee were enlarged by virtue of the order of Judge Winslow and that, under said order, the Referee should have permitted evidence tending to show that the bankrupt never had the property he was found to have concealed (fols. 167-294).

That this contention was entirely baseless, will be apparent from the following: *This order was entered*

by the attorney for the bankrupt (fol. 170). *No appeal from this order of reference was ever taken; nor was any motion made to resettle this order.* The order was made by Judge Winslow after he had rendered his opinion above quoted (fols. 149-158). This opinion clearly shows that the only question referred to the Referee was the ability of the bankrupt to comply with the turnover order, upon the authority of the *J. H. Small Shoe Co.* case. The Referee understood the order to mean just that, and in his report (fols. 246-7) clearly states that was his understanding. While the hearings were in progress, the bankrupt made a motion in the United States Court to instruct the Referee as to what testimony should be received under this order. Judge Knox, who heard the motion, refused to give any such instructions (fols. 232-6). When the Referee's report was filed it came up for confirmation again before Judge Winslow, who had the matter before him on three other occasions (fols. 22-31, 77, 149-158). When the matter was argued before Judge Winslow, the attorney for the bankrupt again urged that the Referee erred in refusing to admit testimony showing that the bankrupt did not have the property on July 8th, 1926, or prior thereto. It was Judge Winslow who made the order of reference of July 8th, 1926 (fols. 149-158), and he must certainly be presumed to have known what he intended by that order of reference, and how that order should be construed. Judge Winslow dismissed the contentions of the counsel for the bankrupt, granted the motion to confirm the Referee's report, and an order was entered confirming the order of the Referee in every respect (fols. 260-278), and directing that the bankrupt be punished for contempt.

The mere recital of these facts disposes of the claim that Judge Winslow must have had in contemplation, "the granting of an opportunity to the bankrupt to ex-

onerate himself if he could do so by competent and credible evidence," if by "competent and credible evidence" is meant an opportunity to show that the turnover order was improperly granted.

It is therefore very clear that Judge Winslow's order was correctly interpreted by the Referee and by Judge Winslow himself and by the Circuit Court of Appeals and that it did not enlarge the issues of the case, the only issue being, "What did the bankrupt do with the property since July 8th, 1926?"

No constitutional right was denied to the bankrupt.

POINT II.

The order affirmed by the Circuit Court of Appeals, directs that the bankrupt be punished for contempt for failure to comply with the turn over order, and is part of a civil proceeding. In reality, it is part of the turn over proceeding, which is civil.

In the courts below, the bankrupt intimated that this proceeding to punish him for contempt is a criminal proceeding, and claimed that he should not be punished because he alleged he was not shown beyond a reasonable doubt to have had possession of the property when the summary order was entered (fol. 299).

The trustee maintains that, while the record shows beyond a reasonable doubt that the bankrupt had in his possession or under his control the goods, wares and merchandise and moneys enumerated in the order, the turnover proceeding and the contempt proceeding arising by reason of the bankrupt's failure to comply with the turnover order, are civil proceedings, and need only be established by a fair preponderance of evidence.

There is no doubt but that a great deal of confusion is apparent in the decisions in some of the jurisdictions remote from busy commercial centers as to the nature of the turnover orders and the proceedings to punish for contempt.

That a proceeding to compel a bankrupt to turn over property is regarded as a civil proceeding, cannot be doubted.

> *Re Plaza Shoe Co.*, 15 Fed. 2d, 278, 280 (C. C. A., 2nd);
>
> *Free v. Shapiro*, 5 Fed. 2nd, 578, 580 (C. C. A. 4th).

The failure to comply with a turnover order is a civil and not a criminal contempt. Sir John Fox, "The History of Contempt of Court" (Oxford, 1927), page 1.

This Court in *Gompers v. Bucks Stove and Range Co.*, 221 U. S. 418, 442, expressly held that the contempt arising out of a bankrupt's failure to comply with a turnover order, constitutes a civil rather than a criminal contempt.

To the same effect is *Michaelson v. U. S.*, 266 U. S. 42

POINT III.

The turnover order entered July 8th, 1926, affirmed November 9th, 1926, was a conclusive estoppel against the bankrupt upon the date of its entry upon the question of the bankrupt's possession of the property on that date. It could not be attacked upon the motion to punish the bankrupt for contempt.

In the *Matter of Frankel*, 184 Fed. 539, the then District Judge Learned Hand, while expressing serious doubt upon the merits of the particular summary order before him, nevertheless held that it was conclusive upon the question of the respondent's ability to comply with its terms at the time of its entry. In the course of his opinion, at page 541, he said:

> "It has undoubtedly been the practice in this district to treat such orders as conclusive estoppels upon the date of their entry, and to leave open to the respondent only the issue of showing what he has done with the money since that time."

It is respectfully submitted that the decision of Judge Learned Hand in the *Frankel* case, *supra*, is more logical than his subsequent dissenting opinion in *Re Oriel*, 23 Fed., 2nd, 409, 412.

Discussing the *Frankel* case, *supra*, Judge Thacher, in a very able and scholarly opinion, in *Re Oriel*, 17 Fed. 2d. 800, at page 801, says:

> "I am impressed with the soundness of the decision in the *Frankel* case, because it seems to be in accord with the practice of Courts of Equity in cases of civil contempt, to enforce by coercive means, through the process of attach-

ment, compliance with the affirmative commands of their decrees. The merits of the case in which an injunction is duly issued by a Court of general jurisdiction is never open to inquiry in such proceeding *Howat v. Kansas*, 258 U. S. 181, 42 S. Ct. 277, 66 L. ed. 559; *Hutto Sash, etc., Co. v. Fuelle* (C. C.), 143 F. 363; *U. S. v. Debs* (C. C.), 64 F. 724; *People v. Van Buren*, 136 N. Y. 352, 32 N. E. 775, 20 L. R. A. 446; *People v. Spalding*, 2 Paige (N. Y.) 326; *Hamlin v. N. Y., etc., Ry. Co.*, 170 Mass. 548, 49 N. E. 922; *Russell v. East Anglian R. Co.*, 2 Macn. & G. 104; *Woodward v. Lincoln*, 3 Swanst. 626."

In *Re J. H. Small Shoe Co.*, 16 Fed. 2d. 205; the Circuit Court of Appeals (2nd Circuit), at page 206, said:

> "We held in *Re Starcuba*, 174 Fed. 330, 98 C. C. A. 202, 20 Ann. Cas. 888, that upon contempt proceedings the summary order to surrender or pay made out a *prima facie* case. In *Re Weber*, 200 Fed. 404, 118 C. C. A. 556, we not only repeated this, but went further. We said that the respondent did not answer the *prima facie* case so made out by a bare denial that he could then comply with the order. At best, he has only two courses open to him. First, he may accept the order as correct when made, in which case he must show that he has since its entry, disposed of the money then found to be in his hands or within his control. Whether the trustee has the burden of proof we need not now say, but the duty of going forward is upon the respondent, and he can fulfill it only by accounting circumstantially for his disposition of the property."

To the same effect are:

> *Re Shulman v. U. S.* (C. C. A. 6th), 18 Fed. 2d, 579-580.

Reardon v. Pensoneau, 18 Fed. 2d 244, 246 (C. C. A., 8th).

U. S. ex rel. Pabsas v. Moore, 294 Fed. 852, 857, (C. C. A., 2nd).

In Re Starrakis, 174 Fed. 330, 332 (C. C. A., 2nd).

POINT IV.

The rule laid down by the bankruptcy courts that, upon a motion to punish a bankrupt for contempt for failure to comply with a turnover order, the bankrupt will not be permitted to urge as a defense that the Court making the order erred in its judgment, is supported by the highest authority.

In the *Oriel* case, *supra*, Judge Thacher, at page 802, says:

> "In this state, where the surrogates are given power by statute to enforce their orders by contempt proceedings, it is held in the Court of Appeals that, when process of contempt is employed to enforce compliance by an executor with a decree of distribution directing the payment of money, the investigation is limited to the service of the decree upon him and the facts of neglect constituting his violation of the decree. *Matter of Snyder*, 103 N. Y. 178, 8 N. E. 479. In all such cases the purpose of the proceeding is to coerce compliance with an order or decree entered after full hearing and careful determination, adjudicating rights existing between the parties to the litigation. Once those rights are determined by a Court having jurisdiction, there can in equity be no withholding of the process of the Court employed for their enforcement; and

in answer to the process of attachment the respondent is never permitted to question upon the merits the order or decree which he has disobeyed. The commitment in such cases has been aptly said not to be distinguishable in substance from a *capias ad satisfaciendum*, founded on a judgment at law. *Adams* v. *Adams*, 80 N. J. Eq. 182, 83 A. 190, Ann. Cas. 1913 E. 1083, Chase's Blackstone, 853.

"Surely it cannot be said to be sufficient answer to such a writ to question the judgment at law or decree in equity as not supported by evidence excluding all reasonable doubt upon the issues upon the determination of which adjudication was had. The doctrine that an injunction duly issuing out of a court of general jurisdiction, with equity powers, upon pleadings properly invoking its action, and served upon persons made parties thereto and within the jurisdiction, must be obeyed, and cannot be questioned in contempt proceedings, has been carried so far that the Supreme Court of the United States has said that, even if the Court issuing the injunction erred in assuming the validity of a void law going to the merits of the case, the invalidity of the law will not be examined in proceedings to punish criminally the violation of the injunction. *Howat* v. *Kansas*, 258 U. S. 181, 42 S. Ct. 277, 66 L. ed. 550.

"It is to be noted that this was said of a case of criminal contempt, in which the defendants were sentenced to imprisonment *for* one year. Nothing could more emphatically show the conclusiveness of an order or decree in proceedings to punish its violation or to coerce its performance. And the case is authority for the application of the rule, not only in civil contempt, but in criminal contempt as well. For these reasons, and for the reasons well stated by Judge Hand in his opinion in the *Frankel* case, I believe that case should be regarded as authoritative until overruled by superior authority."

Judge Thacher's views quoted above, are supported by the highest authorities in jurisdictions entitled to respect, as will appear from an examination of the following cases:

(a) *Federal Courts:*

The leading authority in the Federal Courts is undoubtedly *Howat v. Kansas*, 258 U. S. 181, cited in *Re Oriel, supra*, where this Court, at page 189, said:

> "An injunction duly issuing out of a court of general jurisdiction with equity powers upon pleadings, properly invoking its action and served upon persons made parties therein and within the jurisdiction, must be obeyed by them however erroneous the action of the Court may be, even if the error be in the assumption of the validity of a seeming but void law, going to the merits of the case."

To the same effect are:

Brougham v. Oceanic, 205 Fed. 857.
U. S. v. Alger, 62 Fed. 824.
Blake v. Nesbett, 144 Fed. 279.
Re Braun Co., 259 Fed. 309.
Michaelson v. U. S., 266 U. S. 42.

(b) *New York cases:*

The principal New York cases, in addition to *In re Snyder*, referred to by Judge Thacher, sustaining these views are the following:

People ex rel. Davis v. Sturtevant, 9 N. Y. 263.
People ex rel. Day v. Bergen, 53 N. Y. 404.
Daly v. Amberg, 126 N. Y. 490, 494.
Ketchum v. Edwards, 153 N. Y. 534, 538.
Stoltz v. Tuska, 82 App. Div. 81.

Brown v. *Brownstein*, 84 App. Div. 499.
Matter of Woodruff v. *Van Ness*, 17 App. Div. 581.
Matter of Huntsville, 19 App. Div. 381.
Lawson v. *Tyler*, 98 App. Div. 10.
Elder v. *Taylor*, 211 App. Div. 682.

(c) *New Jersey*:

Cape May R. R. Co. v. *Johnson*, 35 N. J. Equity, 422. In this case, the defendant was sought to be punished for violating an injunction. He endeavored to attack the order on its merits. The Court silenced him by adhering to the long established rule. At page 423, it is said:

> "The regularity, validity, or correctness of the order contemned cannot be examined on this proceeding. Even if it was improvidently granted or irregularity obtained, it must nevertheless be respected until it is annulled by the proper authority."

Una v. *Dodd*, 39 N. J. Equity, 173 (reversed on other grounds in 40 N. J. Equity, 670)

(d) *Missouri*:

State ex rel. Carroll v. *Campbell*, 25 Mo. App. Reports 635-639.

(e) *Massachusetts*:

Irvine & Casson v. *Hamlett*, 229 Mass. 500.

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(m) *Oregon*:

State v. *LaFollette*, 100 Ore. 1; 196 Pac. 412.
State ex rel v. *Downing*, 40 Ore. 309-21.

(n) *Pennsylvania*:

Re Passmore Williamson, 26 Pa. State 9.
Hoskins v. *Somerset Coal*, 219 Pa. State 373.

These authorities show that the principle is firmly rooted that an order of a Court having jurisdiction must be implicitly obeyed, however erroneous it may be, and that it is no answer for one called upon to answer for disobedience, that the order was broader than the facts warranted, or that the Court, upon the facts, was unjustified in making the order. Litigants are not permitted, under the plea of hardship or injustice, real

or pretended, to nullify at will orders or decrees, however improvidently made, even if it may seem certain that the original Court acted in granting them, under a misapprehension or under some mistake.

Unless, therefore, it can be said that the bankrupt is the special ward of chancery, there would appear no valid reason for a rule that his failure to comply with a lawful order of the Court is not punishable unless the trustee can, after the lapse of years, once again prove a case against him "beyond a reasonable doubt." This favor is not shown to any other litigant in the courts. It is hard to find a justification for the exception in favor of a bankrupt who is either disinclined or disadvised to comply with a turnover order.

POINT V.

In this proceeding to punish the bankrupt for the civil contempt of failing to comply with the turnover order, it is not necessary to prove the concealment or the failure to turn over the property, beyond a reasonable doubt.

As has already been demonstrated, the highest authorities stand for the principle that upon a motion to punish for contempt, the defendant is never permitted to urge as a defense that the original mandate or order was improperly granted, upon insufficient proof, or otherwise. Upon further careful examination it will be found that the cases which hold that the violation of the order must be proved beyond a reasonable doubt have no application to the facts of the case at bar. These cases were practically all decided before the decision in *Gompers* v. *Buck's Stove Co.*, *supra*, and proceed upon the erroneous theory that the contempt

proceeding is criminal. Where the Courts have recognized the true nature of the contempt, no such confusion has resulted.

It has been seen that these contempt proceedings are civil.

Gompers v. Buck's Stove Co., supra.

In *Hilton v. Hilton*, 106 Atl. 139, the Court of Chancery of New Jersey refused to entertain a plea on the part of a defendant that, in the determination of a matter involving the punishment for contempt, the rule of criminal law must be applied, and the defendant must be proven guilty beyond a reasonable doubt. The Court held no such proof is necessary in the case of a civil contempt.

In the case of *Hake v. The People*, 230 Ill. 174, the Court had under review an order finding the defendants guilty of contempt of court. The Court found that the case involved a civil contempt, and said, at page 193:

> "* * * the case is, from its inception to its conclusion, in all its procedure, essentially a civil chancery proceeding, conforming itself, in its pleadings, character and quantity of proof required, and in its course through the appellate tribunals, to the rules and practice applicable to other chancery proceedings."

The Court held that in such a proceeding, it was not necessary to establish the case by proof beyond a reasonable doubt.

In *Flannery v. The People*, 225 Ill. 62, the Court found the contempt to be civil. At page 71 the Court said:

> "We are of the opinion that the rules of evidence applicable to civil cases should be followed

> in this case, and that the proof of the defendant's guilt beyond a reasonable doubt was not necessary."

To the same effect is the case of *McBride* v. *The People*, 225 Ill. 315.

The following cases hold that in a case of civil contempt, it is not necessary to prove the defendant guilty beyond a reasonable doubt:

> *Cutting* v. *Van Fleet* (C. C. A. 9th), 252 Fed. 100.
>
> *People* v. *Kowalsky*, 307 Ill. 378.
>
> *Re McCormick*, 132 A. D. 921, aff'd 196 N. Y. 571, opinion in 117 N. Y. Supp. 70.
>
> *Braketteal* v. *Adams*, 98 Georgia 722.
>
> *West Disinfecting Co.* v. *Koppelman*, 216 Ill. App. 438.
>
> *North Dakota* v. *Harris*, 14 North Dakota 501.
>
> *Morgan* v. *National Bank of Commerce*, 90 Oklahoma 280.

The issues in contempt cases are properly the following:

> "Was a valid order made, and has the defendant violated it?"

In this case the making of the order is not disputed. The bankrupt admits that he did not comply with it. The trustee has proved his case.

POINT VI.

Unless the bankrupt is punished for contempt upon his failure to comply with the turnover order, turnover orders would be useless.

Some of the Courts which have intimated that turnover orders in and of themselves are not sufficient evidence upon which to base a punishment for contempt, have suggested that the turnover orders, nevertheless, serve a useful purpose inasmuch as failure to comply with their terms would mean the barring of a discharge.

However, turn over orders are entered against persons who are not bankrupts, and who therefore are not concerned about obtaining their discharge. This is true of officers of bankrupt corporations and third parties. As against such persons, the turn over orders would be useless unless enforceable by punishment for contempt for failure to comply with them.

Nor can it be said that the entry of turnover orders creates a debt, because it has been expressly held by this Court in *Mueller* v. *Nugent*, 184 U. S. 1, that an order to turn over money is not an order for the payment of a debt, but an order for the surrender of assets of the bankrupt, placed *in custodia legis* by the adjudication. To the same effect:

> *In re Schlesinger*, 102 Fed. 117 (C. C. A. 2nd).

Obviously, unless the Courts treat turnover orders as conclusive estoppels against the parties as of the date of entry, turn over orders will become innocuous—

"solemn fatuities," as Judge Learned Hand has so well said in *J. H. Small, supra*. If the Courts are not prepared to declare these turnover orders useless, they must give full force and effect to their meaning, and render failure to comply with these orders dangerous and uninviting.

POINT VII.

The petition for a writ of certiorari should be denied. To reopen this matter at this time might give the bankrupt an opportunity to retain the money and property concealed by him, and would probably enable the bankrupt to escape the just consequences of his own misdoing. It would be unfair to creditors, and encourage the perpetration of fraud in bankruptcies.

For more than three years now, the bankrupt has been laughing at the trustee and his creditors. The arm of the court of equity has failed to reach him.

The petition was filed in November, 1924. There was a shortage of between $25,000 and $31,000 in the bankrupt's assets (fol. 383). Turnover proceedings were instituted; hearings before the Referee continued for eleven months; the Referee found for the trustee; the District Court affirmed the Referee's finding; the Circuit Court refused to allow an appeal; and the District Court again declared that there was no reason for a reargument, and that there must be some finality to these proceedings (fol. 363). The bankrupt failed to turn over the property. A motion was made to punish the bankrupt for contempt. Hearings were again held, the Referee recommended punishment, the District and Circuit Courts affirmed, yet the bankrupt is still at

liberty, sprinkling crocodile tears all over his pleadings, but all the time laughing at his creditors, and presumably, not taking the Courts seriously either. Though the trustee has been victorious upon every material point in every one of the numerous appearances in court, thus far the victories are only on paper. Defeated at every turn before Referees, before District Judges, and the Circuit Court of Appeals for more than three years, the bankrupt is still at large, still concealing the creditors' assets, and this Court is asked to postpone final judgment still further.

For more than three years this bankrupt has been able to postpone the day when he should turn over his property to his trustee in bankruptcy, and he has not as yet exhausted all of his opportunities for further delay.

And now the bankrupt asks this Court to declare in fact that he did not have a fair hearing, that we must reopen the turnover order, re-examine the charge of concealment, forget about the fact that the matter had been adjudicated. At this time the trustee's witnesses may have disappeared, records may have become vague, memories of men may have become faded. Shall the bankrupt profit by the very delays he has brought about, and which it is in his power, seemingly, to continue?

The honest merchants who extend credit are thus penalized, and the bankrupt who fraudulently conceals the property belonging to his creditors, can never, seemingly, be brought to respect the mandates of the Court. In the efforts to nullify the effect of turnover orders, the last few teeth of the bankruptcy law are sought to be prematurely extracted.

It is respectfully suggested that it is these delays on the civil, as well as the criminal, side of our courts, caused by the unexplained resourcefulnes of bankrupts

who plead poverty, that so unjustly tend to make our courts subjects of unfair criticism. It is just such possibilities of delay and the probabilities of ultimate futility of efforts to enforce the provisions of the bankruptcy law that encourage the multiplication of fraudulent bankruptcies, and the theft of thousands of dollars annually.

Respectfully submitted,

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